SDCV v Director-General of Security: Procedural Fairness and the Ability to Decide a Matter Based on Secret Evidence Not Disclosed to a Party or Their Legal Team

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With changes afoot in the judges sitting on the High Court later in 2023 this article addresses a hope for a future change enabling greater protection of fundamental rights of an individual to know the accusations and evidence against them. The decision in SDCV, by a slim majority of one, validated the challenged law in s 46(2) of the Administrative Appeals Tribunal Act 1975 (Cth). This precluded the right of SDCV or his legal team from knowledge of the evidence against him. This article documents the decision and reasoning of the High Court in this case. It sets forth the basis for concern in such national security situations.

INTRODUCTION

Particularly since the events of 9/11, there has been an increase in the use of procedures by which decisions are made regarding an individual based on information, evidence or intelligence to which the relevant individual is not privy. This is typically associated with a preventive rather than reactive approach to addressing behaviour. Such evidence is typically used as a basis for making control orders or preventive detention orders, with a view to deterring criminal activity,[1] though as we will see the use of such material has been extended well beyond this context. This is a familiar pattern, where exceptions to traditional legal processes are introduced and, sometimes, are expanded over time into other areas where the rationale for the exceptional procedures is not as strong. Sometimes, the growth of these exceptions comes to threaten the original principle.[2] Problematically, it is contrary to fundamental common law traditions.[3] It is somewhat disconcerting that Frank Kafka's sharp observations of the "justice" of the early 20th century authoritarian regimes should become applicable to so-called strong democracies with entrenched rule of law and procedural fairness traditions.[4]

The practice is typically justified on national security grounds, that the disclosure of such material would or could prejudice Australia's security and defence interests, and/or that would-be witnesses might legitimately fear for their own safety if their identity were known.[5] It has also occurred in areas not obviously connected with national security. One concern with this is that in some cases expert evidence

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[1] Tamara Tulich, "Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom" (2012) 12(2) *Oxford University Commonwealth Law Journal* 341, 342.

[2] John Jackson, "The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition" (2016) 20(4) *International Journal of Evidence and Proof* 343, 343–345.

[3] *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532: "the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering of the truth."

[4] *The Trial* (1925): "the legal records of the case, and above all the actual charge sheets, were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea … For the Defence was not actually countenanced by the Law, but only tolerated", cited by Lord Steyn (dissenting) in *R (Roberts) v Parole Board* [2005] 2 AC 738, 787; [2004] UKHL 45.

[5] These concerns are not new: *Al Rawi v Security Service* [2012] 1 AC 531, 577 (Lord Dyson); [2011] UKSC 34.

is in fact unreliable.[6] This is coupled with the fact that, in the security context, judges are sometimes more deferential than normal to claims by the Executive.[7] Another is that it is well-documented that, on occasion, claims that confidentiality is necessary for the sake of national security are exaggerated.[8] Traditionally we rely on cross-examination as the primary means of testing the reliability of evidence. Clearly this would not be possible if the person against whom the material is being used, nor their legal representative, is aware of the nature of the material.

In the recent past, such measures have been held valid against constitutional challenge by a unanimous or near unanimous court.[9] However, *SDCV v Director-General of Security* is a 2022 High Court of Australia decision that saw a narrow majority of one in a split decision 4:3 dismissing an appeal from the full Federal Court addressing these fundamental questions of constitutional importance. They included the judicial function of procedural fairness and the ability to know the evidence on which one's rights are determined. One member of the majority only reached a decision in favour of constitutionality after reading in an amendment to the challenged law. While the appellant was not successful in this case, the decision by such a narrow margin represents something of a change from the status quo, and portends a High Court more hostile to grave incursions into traditional judicial process.

This article provides an explanation of the reasoning in the case. It starts with the background, the appellant and respondent's arguments and the reasoning of the majority and minority judgments.

Background Facts

Section 46 (2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*) provides that the Federal Court "shall … do all things necessary to ensure that the [certificated] matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding".

The question before the High Court was the constitutional validity of this section and whether it was contrary to Ch III in its denial of a party before a federal court an opportunity to address evidence on which the court relied that affected the party's legal rights.[10] A further consideration for the High Court was whether the law was invalid as it enabled the court to act inconsistently to its fundamental character and/or contrary to judicial power.

SDCV, a citizen of Lebanon married an Australian citizen and in 2012 he was granted an Australian partner visa. After this SDCV applied to become and was granted Australian citizenship. To confirm citizenship the recipient must attend and give a pledge of commitment at a citizenship ceremony. SDCV had not yet completed this phase when he was informed the citizenship ceremony would be delayed and his citizenship may be cancelled due to an Australian Security Intelligence Organisation (ASIO) investigation. This was ultimately the case in 2018 under s 501(3) of the *Migration Act 1958* (Cth) because of an adverse security assessment (ASA) based on character. It was alleged SDCV had a relative whom had been convicted of a terrorist offence and other male relatives connected with Islamic State of Iraq and the Levant (ISIL), a declared terrorist organisation. The ASA certificate is accompanied by a statement of grounds which are relied on in making the decision (excepting information that in the

[6] Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Report No 325 (2011) 3–6; Gary Edmond and Andrew Roberts, "Procedural Fairness, the Criminal Trial and Forensic Science and Medicine" (2011) 33 *Sydney Law Review* 359, 374: "most Australian judges have also been inattentive to the reliability of incriminating expert evidence"; Kent Roach, "The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations" in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond* (Routledge, 2010).

[7] Aileen Kavanagh, "Special Advocates, Control Orders and the Right to a Fair Trial" (2010) 73 *Modern Law Review* 836, 854.

[8] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) 302; *Minister for Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness v Mohamed Harkat* [2014] 2 SCR 33, 65–66 (McLachlin CJ, LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ); Adam Tomkins, "National Security and Due Process of Law" (2011) 64 *Current Legal Problems* 215, 252: "courts must be alert to guard against the possibility that they may be dazzled by overblown government claims as to sensitivity, risk and security. For the record shows that such claims may often be exaggerated and are sometimes wholly spurious."

[9] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

[10] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [11] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

Director-General's opinion would be contrary to security). The ASA decision is made pursuant to the powers contained in the *Australian Security Intelligence Organisation Act 1979* (Cth) (the *ASIO Act*) and is comprised of the ASA certificate and statement of grounds. In accordance with the *ASIO Act*, SDCV was provided with the ASA decision, but with portions omitted by the ASIO Minister where they were satisfied that precluding parts of the statement was necessary to avoid grounds prejudicial to security.[11]

SDCV was presented with the conclusions of the ASA decision, namely that ASIO "considered he supported terrorism and a terrorist organisation, and that he had used tradecraft (such as a covert phone) when communicating with people who were of security concern",[12] but not the information from which this conclusion was drawn. SDCV disagreed with the conclusions but was never given the opportunity to know and thus reasonably contest the weight, probity, and reliability of the evidence relied on. The Minister for Immigration had access to the entirety of the ASA decision in reaching his conclusion that SDCV's visa should be cancelled.[13]

SDCV appealed the Minister's decision to the Administrative Appeals Tribunal (AAT), which affirmed the Minister's decision to cancel SDCV's visa, again by reference to secret information. SDCV never brought a constitutional challenge against the executive power to make decisions which would be prohibited from any review due to their secrecy.[14] Instead, SDCV appealed the AAT decision to the Federal Court on a question of law. SDCV claimed, as one ground of the appeal, that there was no evidence on which both the Immigration Minister and the AAT could rely in reaching their decisions. SDCV accepted he could not provide substantive submissions on this ground given he did not have access to the so-called evidence relied on. Given the situation, the Federal Court chose to review the evidence in a closed hearing with only the Commonwealth's legal representatives present. Based on this secret hearing SDCV's appeal was rejected.

At the AAT hearing s 39B (2)(a) of the *AAT Act* was activated by the ASIO Minister to present a certificate detailing some of the ASA decision (certificated matter) that could not be disclosed due to public interest in non-disclosure of matters that would allegedly impact Australia's national security.[15]

Further, s 39A (8) of the *AAT Act* ensured the certificated matter could not be disclosed so the ASIO Minister issued further certificates to conduct a closed session without SDCV or his legal team.[16] The Tribunal could not form a view on the evidence presented in the open session regarding the ASA decision but on the evidence from the closed session concluded the decision was justified.[17]

This decision was appealed to the Federal Court under s 44 of the *AAT Act* on questions of law. All grounds of appeal were rejected with the Full Court of the Federal Court rejecting the appeal and affirming the AAT decision. Their reasoning was in part based on consideration of whether there was a practical injustice, determined as a whole in the context of the legislative scheme.[18]

SDCV thus had three decisions against him, alleging he was a security risk and removing his citizenship without him, or his legal team, ever being privy to the basis for claiming this risk or the evidence

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[11] *Australian Security Intelligence Organisation Act 1979* (Cth) s 4.

[12] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [26] (Kiefel CJ, Keane J, Gleeson J); [2022] HCA 32.

[13] *Migration Act 1958* (Cth) s 501(3).

[14] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [59] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32: "The steps to this point *could* possibly have given rise to constitutional complaint on the basis that the executive was given the power to make decisions which, by reason of the secrecy of the underlying information, were practically immune from review. But that complaint – if made, which it was not – would have had its own difficulties".

[15] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [5] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[16] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [6] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32. "Section 39A(9) … If a person representing an applicant is present when such evidence is adduced or such submissions are made, it is an offence for the representative to disclose any such evidence or submission to the applicant or to any other person, punishable by two years' imprisonment."

[17] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [7] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[18] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [46] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

on which the three decisions were made. However, the appellant did not challenge the validity of the certificates.[19]

Procedural fairness requires a fair hearing enabling parties affected by a process to have access to the material from which the decision is to be made. In this case, the basics of procedural fairness, allowing SDCV or his legal team access to the information, was denied. The legislation enabled the Federal Court to view the secret material, but it could not allow SDCV access.

SDCV appealed to the High Court. The basis of the appeal related to the Federal Court's role as a Chapter III court, an essential characteristic of such a court being to ensure procedural fairness is observed. Prior to entering the Federal Court, the exercise of executive decision-making power did not attract a constitutional obligation to provide procedural fairness.[20] Although procedural fairness can be presumptively implied when applying statutory power, and in some cases non-statutory power, it can also be shown to be intentionally precluded in executive exercise of power.

Appellant Arguments

The appellant argued that Ch III of the *Constitution* prohibits a law that requires such a court to adopt an unfair procedure. The appellant argued that procedural fairness at minimum applies

> [I]f a court is to make an "order that finally alters or determines a right or legally protected interest of a person", the court must afford to that person "a fair opportunity to respond to evidence on which that order might be made."[21]

The appellant suggested this might be achieved by giving the "gist" of the evidence to the person affected or having a special advocate to represent a person's interests. [22]

The appellant also argued that any operation of s 46(2) of the *AAT Act* that cannot be read down to avoid exceeding the constitutional minimum requirements must be severed and if it could not, the section should be declared wholly invalid.[23]

The appellant also relied on *HT v The Queen*[24] in which Kiefel CJ, Bell and Keane JJ stated:

> In an adversarial system it is assumed, as a general rule, that opposing parties will know what case an opposite party seeks to make and how that party seeks to make it. A party can only be in a position to put his or her case if the party is able to test and respond to the evidence on which an order is sought to be made.[25]

The majority, however, distinguished this case as being relevant only to criminal matters. It was not concerned with the very different scenario in *SDCV* of legislative power to limit evidence in other hearings particularly when addressing national security.[26]

On the question of finally determining rights the appellant relied on *dicta* by Gageler J in *Condon v Pompano*:

> My view, in short, is that Ch III of the *Constitution* mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia. Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure

[19] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [59] (Kiefel CJ, Keane and Gleeson JJ), [168] (Gordon J); [2022] HCA 32.

[20] See *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [59] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[21] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [51] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32, quoting *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 595–596 [182]–[183] (Crennan J) (footnotes omitted).

[22] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [51] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[23] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [96] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[24] *HT v The Queen* (2019) 269 CLR 403.

[25] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [61] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32, quoting *HT v The Queen* (2019) 269 CLR 403, 416 [17].

[26] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [62] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

> that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made.[27]

The majority dismissed this as not applying to the procedural statutory rights the appellant was arguing and in addition, they noted Gageler J's view was not supported in *Pompano* nor has it been adopted by a majority of the High Court in any other case.[28] The plurality in *Pompano* adopted a statement of Gleeson CJ:

> [I]f legislation provides for novel procedures which depart from the general rule described, the question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice."[29]

Respondent's Arguments

Essentially the respondent maintained that any minimum requirement to know and respond to allegations or material before the Federal Court is not required to obviate practical injustice under s 44 of the *AAT Act*.[30] Rather procedural fairness was to be considered in the context in which it is being sought.[31] They argued the *AAT Act* provides a peculiar jurisdiction in the Federal Court for a unique process under s 46 when dealing with decisions by the Security Division of the AAT. This process, the respondent argued, should be considered as a whole and against alternative review options open to the appellant.[32]

The Majority Judgment

Kiefel CJ, Keane and Gleeson JJ indicated a visa holder's rights could be limited by the executive government in a manner that prevented the visa holder having access to security-sensitive information.[33] The majority decided:

> The appellant was lawfully denied the right to know the totality of information which led to the making of the ASA decision under unchallenged laws and unchallenged administrative decisions directed to the preservation of confidentiality in the interests of national security. Section 46(2) of the *AAT Act* was consistent with the statutory provisions establishing the rights of the appellant to enter and remain in Australia. Moreover, s 46(2) did not affect the integrity of the Federal Court in the independent and impartial performance of its functions.[34]

The majority noted the appellant had an alternative course of action, but this would not have resulted in the outcome he desired. The alternatives included a judicial review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth) which would not have attracted s 46(1) of the *AAT Act*, which the majority considered bought a forensic advantage in at least providing the Court with the evidence relied on. Under the two alternatives the majority concluded public interest immunity would have precluded consideration of the certified material.[35] So in the circumstances it was decided SDCV suffered no practical injustice.[36]

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[27] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [64] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32, quoting *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 38, 105 [177]. See also 108 [188], 110–111 [194]–[196].

[28] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [65] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[29] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37].

[30] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [52] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[31] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [53] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[32] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [123]–[127] (Gageler J); [2022] HCA 32.

[33] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [12] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[34] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [100] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[35] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [13] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[36] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [14] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

As to practical injustice, the majority indicated this was not addressed by fixed rules but rather a contextual consideration of the individual matter and the rights and interest affected.[37] It concluded:

> [I]t is necessary to appreciate that Ch III of the *Constitution* does not entrench the adversarial system of adjudication and its incidents as defining characteristics of the courts for which it provides. The limitation imposed by s 46 on the ability of a person in the position of the appellant to participate in an appeal on a question of law under s 44 does not, in any way, compromise the functioning or impartiality or independence of the Federal Court.[38]

The protection of security assessment information is assured by s 37(5) of the *ASIO Act* which prohibits any proceedings before any court or tribunal in relation to a security assessment other than an application under s 54 of the *AAT Act*, to the AAT's security Division pursuant to ss 39A and 39B of the *AAT Act*. [39]

While accepting that legislation cannot require a Ch III Court to act inconsistently with the character of such a court and in so doing deny procedural fairness the majority considered this was to be determined by "whether taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid 'practical injustice'".[40] In this the majority quoted with approval a passage by Crennan J in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*:[41]

> Parliament can validly legislate to exclude or modify the rules of procedural fairness provided there is "sufficient indication" that "they are excluded by plain words of necessary intendment". Whether the obligation to accord procedural fairness is satisfied will always depend on all the circumstances.[42]

Essentially for the majority they must "simply ask the question whether, having regard to 'all aspects of [a court's] procedures and the legislation and rules governing them', the impugned legislation is an occasion of practical injustice".[43] The only right at stake for the majority was the appellant's right to hold a visa in his circumstances. [44]

The majority concluded there was no practical injustice:

> The denial of an opportunity for the appellant to know the totality of information that justified the making of the ASA decision was an incident of the statutory regime under which the appellant was permitted lawfully to enter and remain in Australia. The statutory regime under which he was present in Australia as a visa holder denied him that information when the ASA decision was made… There is no question that this state of affairs was lawfully imposed.[45]

THE MINORITY JUDGMENTS

Gageler J noted the issue in the case was one that became prominent after 9/11, and had been addressed in other common law jurisdictions under their various rights protection.[46] He concluded "that the blanket proscription by s 46(2) of the *AAT Act* … renders the process by which the Federal Court is to hear and

[37] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [54] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[38] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [15] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32 (footnotes omitted).

[39] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [28] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[40] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [54] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[41] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532.

[42] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [56] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[43] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [67] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32, quoting *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [156].

[44] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [71] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[45] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [73] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[46] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [105] (Gageler J); [2022] HCA 32. "Questions of that kind have been addressed in the United States under the rubric of the constitutional guarantee of 'procedural due process.' They have been addressed in Canada by reference to constitutionally enshrined 'principles of fundamental justice.' In the European Union, and in the United Kingdom, they have been addressed by reference to the human right to a 'fair hearing'" (footnotes omitted).

determine an appeal under s 44 of the *AAT Act* procedurally unfair".[47] Further, s 46(2) of the *AAT Act* could not be severed, so the whole of s 46 was invalid.[48] Gordon J supported this.[49]

In Australia where human rights charters do not apply at the federal level, Gageler J relied on Ch III of the *Constitution* to reason that procedural fairness is an essential characteristic of a court exercising the judicial power of the Commonwealth.[50] That power is conferred by s 77(1) of the *Constitution* to resolve "matters" broadly read as outlined in ss 75 and 76 of the *Constitution*. Gageler J described the paradigm of quelling disputes as to rights and obligations between parties as invoking "[t]he unique and essential function of the judicial power [in] the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion".[51]

Section 44 of the *AAT Act* confers original jurisdiction under s 76(ii) of the *Constitution* to hear an appeal.[52] Further, the *AAT Act* confers ancillary jurisdiction on the Federal Court under s 44(7)–(10) to consider supplementary facts in deciding the question of law before it.[53] Gageler J quoted from *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd*, stating:

> Chapter III of the *Constitution* does not admit of "grades or qualities of justice". "The circumstance that [an institution] has been established by legislation as a court means that any jurisdiction conferred on it is necessarily conditioned by the requirement that it observe procedural fairness *in the exercise of that jurisdiction*."[54]

The Commonwealth Parliament is not constitutionally required to confer any federal jurisdiction on any court under s 76 or s 77 of the *Constitution*. However, when it does so, it is constitutionally incapable of being exercised by a court other than in accordance with a judicial process. Judicial process includes procedural fairness.[55] Gageler J contended that the term "'practical injustice' is appropriately used as a synonym for procedural unfairness. What is important to bear in mind, in using that synonym, however, is that the practical injustice referred to is procedural injustice".[56]

Gageler J denied his conclusions in *Pompano* or indeed the cases *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* and *Graham v Minister for Immigration and Border Protection*[57] were authority for anything contrary to the notion that a fair opportunity to respond to evidence given the whole of the circumstances of the matter, including consideration of public interest in maintaining secrecy of the evidence, was fundamental.[58] In noting the legislature's ability to ordain how sensitive information should be addressed Gageler J suggested:

> The broader and more inflexibly a standardised rule proscribing disclosure is framed, … the greater must be the danger of breach of the constitutional minimum. At least that is so absent some form of safety valve by means of which the court can ensure either that the adverse order is not made or that disclosure will occur if the court forms the view that non-disclosure is unfair in the circumstances of the particular case.[59]

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[47] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [112] (Gageler J); [2022] HCA 32.

[48] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [162]–[165] (Gageler J); [2022] HCA 32.

[49] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [200] (Gordon J); [2022] HCA 32.

[50] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [106]–[107] (Gageler J); [2022] HCA 32.

[51] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [115] (Gageler J); [2022] HCA 32, quoting *Fencott v Muller* (1983) 152 CLR 570, 608.

[52] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [116] (Gageler J); [2022] HCA 32.

[53] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [117] (Gageler J); [2022] HCA 32.

[54] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [129] (Gageler J); [2022] HCA 32, quoting *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33, [47] (emphasis added) (footnotes removed).

[55] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [130] (Gageler J); [2022] HCA 32.

[56] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [132] (Gageler J); [2022] HCA 32.

[57] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [146]–[147] (Gageler J); [2022] HCA 32.

[58] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [141] (Gageler J); [2022] HCA 32.

[59] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [150] (Gageler J); [2022] HCA 32.

His Honour observed that the separation of powers allows for the legislature to provide the Executive with functional responsibility for national security, but this was not absolute in judging what is required for national security. The judicial function must be trusted to balance the weighing of rights and fairness to the parties against the needs of national security.[60]

In the circumstances, Gageler J found s 46(2) of the *AAT Act* "'rigid' and therefore procedurally unfair".[61] In support of this conclusion Gageler J referred to Lord Kerr JSC in *Al Rawi v Security Service* noting that "evidence insulated from challenge has the potential to mislead".[62] The same is true of evidence insulated from contextual explanation.

In relation to the question of other avenues such as s 75 (v) of the *Constitution* or Federal Court review under s 39B of the *Judiciary Act*, Gageler J agreed it would not address the appellants concerns as "[n]o order the court could make could relieve against the intransigent preclusive effect on disclosure of a valid certification".[63]

Gageler J did not accept the analysis provided by the respondents and accepted by the majority. He indicated the with and without jurisdiction comparisons were irrelevant. It was no answer to allegations of procedural fairness to indicate "something was better than nothing".[64]

On the question of providing the appellant the gist of the evidence against him Gageler J indicated it might in some cases permit a fair opportunity for the defendant to respond, but not in all cases.[65]

Gordon J found s 46 of the *AAT Act* was "contrary to Ch III of the *Constitution* and wholly invalid". [66] The judicial power of the Commonwealth that courts have sole control over requires ensuring fairness to the parties. This includes the right of a party to meet the case made against them, and to be aware of the details of the case. This, Gordon J considered, was intrinsic to a court's integrity in an adversarial justice system.[67]

Gordon J considered the legislature could not prevent a court ensuring fairness in the context of a case as it would offend Chapter III and the separation of powers. Section 46 of the *AAT Act* was wholly invalid because the section as a whole gave no leeway for the Court to address any practical injustice.[68] Gordon J listed numerous situations in which exceptions modifying the clear rule may apply. However, in relation to s 46(2) of the *AAT Act*, her Honour indicated there was no ability for the court to alleviate unfairness in the context of the case.[69]

Gordon J agreed with Gageler J that the possibility of having taken a separate avenue of review (judicial review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*) were irrelevant considerations in addressing the question of the validity of s 46(2).[70]

Edelman J posed the question faced by the court in stark terms and concluded the answer was no:[71]

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[60] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [151] (Gageler J); [2022] HCA 32.

[61] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [152] (Gageler J); [2022] HCA 32.

[62] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [155] (Gageler J); [2022] HCA 32, referring to Lord Kerr *Al Rawi v Security Service* [2012] 1 AC 531, 592 [93]; [2011] UKSC 34.

[63] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [156] (Gageler J); [2022] HCA 32.

[64] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [128] (Gageler J); [2022] HCA 32.

[65] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [157] (Gageler J); [2022] HCA 32.

[66] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [170] (Gordon J); [2022] HCA 32.

[67] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [173] (Gordon J); [2022] HCA 32 (footnotes omitted).

[68] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [190]–[194] (Gordon J); [2022] HCA 32. "Section 46(2) … it requires the Court to 'do all things necessary to ensure' that the certified matter is *not* disclosed to any person other than a member of the Court as constituted for the purposes of the proceeding. … Unless s 46(2) is invalid, the Court simply cannot disobey the statutory command": [192].

[69] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [179] (Gordon J); [2022] HCA 32.

[70] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [196] (Gordon J); [2022] HCA 32.

[71] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [217] (Edelman J); [2022] HCA 32.

> Could it ever be procedurally fair for a court to decide that a person was lawfully stripped of their permanent right to remain in Australia for reasons which the person will never be given, based upon specific allegations about which the person will never be told, involving evidence which the person will never see and will never be able to address, and without hearing from any counsel to represent the person's interests?[72]

His Honour defended the separation of powers doctrine and the judicial function to quell controversy between parties as an adjudicative, not procuratorial or inquisitive function.[73] Such an adjudicative function requires the court to balance parties' interests such as national security against a party's ability to know the evidence against them while maintaining the integrity of the judicial function.[74] Edelman J concluded the denial of procedure fairness was fatal to the validity of s 46, given the legislation did not provide for mechanisms such as a special advocate[75] to assist in addressing the parties' interests and rights, while maintaining the courts' integrity.[76]

Edelman J's reasoning was listed as:

(1) The *Constitution* does not prohibit all procedural unfairness.
(2) Procedural unfairness must be justified.
(3) The *AAT Act* does not permit balancing the interest of an appellant and the countervailing interest.[77]
(4) The ASIO Minister controls the extent of permitted disclosure.
(5) The *AAT Act* does not authorise the appointment of a special advocate.[78]

Edelman J concluded, referring to *Kable*:[79]

> The *Kable* principle invalidates legislation where it substantially impairs the institutional integrity of a court such that the court may cease to be seen as an institution of justice. If anything more than lip service is to be paid to that principle, it should apply where a court is required to act in a manner that perpetuates extreme procedural unfairness upon an individual in circumstances where that unfairness is not reasonably necessary to protect a compelling countervailing interest. On the only interpretation of s 46 of the *AAT Act* which I consider to be open, the extreme procedural unfairness contained in s 46(2) is an unfairness that is plainly beyond that which is reasonably necessary to protect the compelling interests in s 39B (2).[80]

His Honour agreed with Gordon J that s 46 could not be saved by severing s 46 (2), and cases such as the *Gypsy Jokers*, *Pompano* and *Graham*[81] could not be relied on when addressing this case.[82] His Honour supported the position taken by Gordon J regarding potential differentiation based on the category of person the Court was dealing with, such as citizen, permanent resident etc, stating these could not be used to "create different grades or qualities of justice in the *Constitution*".[83]

In addressing argument that balancing interests has included diminishing procedural fairness when considering a compelling countervailing interest such as in "trade secrets cases; legal professional privilege claims; a liquidator's application for an examination summons; and gender-restricted evidence in native title cases",[84] Edelman J distinguished them. They did not involve prohibiting a person from

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[72] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [216] (Edelman J); [2022] HCA 32.

[73] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [121] (Gageler J); [2022] HCA 32.

[74] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [218] (Edelman J); [2022] HCA 32.

[75] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [223] (Edelman J); [2022] HCA 32.

[76] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [220] (Edelman J); [2022] HCA 32.

[77] See, eg, *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [245] (Edelman J); [2022] HCA 32.

[78] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [224] (Edelman J); [2022] HCA 32.

[79] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[80] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [267] (Edelman J); [2022] HCA 32; see also [225]–[226].

[81] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.

[82] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [221] (Edelman J); [2022] HCA 32.

[83] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [222] (Edelman J); [2022] HCA 32.

[84] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [232] (Edelman J); [2022] HCA 32.

knowing the allegation made against them, did not prohibit the person from addressing the allegation, and did not prohibit them from knowing why their claims were unsuccessful.[85]

The question of fairness for Edelman J was not a "one-size-fits-all concept".[86] It required a refined approach considering "the human dignity of the individual"[87] and the irreducible function of a judicial institution.[88] He quoted Rawls "[b]y the principle of fairness it is not possible to be bound to unjust institutions, or at least to institutions which exceed the limits of tolerable injustice (so far undefined)".[89] Addressing the question of giving the appellant the gist of the evidence against him, for instance, Edelman J concluded it did not provide the Court with authority to mitigate the procedural injustice.[90]

On the respondent's overreach in their argument, Edelman J characterised it as a classically utilitarian one that:

> [T]he end can always justify the means. In other words, the "gift" to an appellant of an administrative merits review hearing and an appeal on a question of law can justify requiring a court to act in a manner that so substantially impairs its institutional integrity that it may cease to be seen as an institution of justice. Such a submission has never been accepted in this Court. It cannot be accepted on this appeal.[91]

Steward J agreed with the majority conclusion that s 46(2) of the *AAT Act* was valid,[92] but differed on some points of reasoning. His Honour, in disagreeing with Gageler J, concluded "[i]n unadorned terms, the regime is better than nothing".[93] He considered "nothing in s 46(2) expressly addresses the duty of the Court to avoid presiding over an unfair trial".[94] His Honour indicated the issue of fairness could be solved by adopting more novel options, including using a special advocate. In this his Honour recognised the circumstances may prohibit even the gist of the evidence against an appellant being provided to the appellant but this would not prohibit an advocate addressing questions of law and s 44 of the *AAT Act* is generally limited to questions of law.[95] Further, he noted it was open to the Court to require disclosure of documents to legal representatives on a confidential basis considering their ethical obligations to the administration of justice.[96]

Steward J took a different view of the words "officer of the Court" in s 46(2) from other judges who had restricted it to a "public servant employed in the court".[97] He concluded an independent lawyer appointed by the Court as a special advocate was an "officer of the court" for the purposes of s 46(4). This enabled a reading of the Act to fulfil the Court's obligation to provide procedural fairness. Steward J believed the options open to the Court should provide[98] as much disclosure as possible, consistent with the need for secrecy.[99]

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[85] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [233] (Edelman J); [2022] HCA 32.

[86] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [237] (Edelman J); [2022] HCA 32.

[87] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [230] (Edelman J); [2022] HCA 32.

[88] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [233] (Edelman J); [2022] HCA 32.

[89] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [231] (Edelman J); [2022] HCA 32, quoting John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, rev ed, 1999) 96.

[90] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [253]–[255] (Edelman J); [2022] HCA 32.

[91] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [240] (Edelman J); [2022] HCA 32.

[92] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [269] (Steward J); [2022] HCA 32.

[93] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [313] (Steward J); [2022] HCA 32.

[94] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [290] (Steward J); [2022] HCA 32.

[95] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [301] (Steward J); [2022] HCA 32.

[96] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [302] (Steward J); [2022] HCA 32. "The Solicitor-General of the Commonwealth agreed with this proposition. Whether the Director-General, as a model litigant, would be obliged to tender certified documents is not a matter that needs to be decided."

[97] See *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [98] (Kiefel CJ, Keane and Gleeson JJ); [2022] HCA 32.

[98] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [296] (Steward J); [2022] HCA 32.

[99] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [288] (Steward J); [2022] HCA 32.

Gordon J had rejected the suggestion of a special counsel, because they were not an "officer of the court" within the meaning of s 46 (4). Nor, in her view, would it overcome practical injustice in the case.[100] Gageler J also disagreed with the approach, because the prohibition on disclosure of material to the relevant party or their representative would remain.[101] He preferred to express no opinion on whether the Federal Court had power to appointment such an officer. Edelman J suggested a special counsel could have alleviated some of the concern, but it was not within the capacity of the court to appoint such a counsel. Rather, it was for the legislature to implement a statutory scheme for such a solution, if it so desired.[102]

Steward J refers to a key consideration acknowledging the unfairness inherent in assuming that giving a court access to the evidence relied on is sufficient, without making it available to the parties. He quotes Lord Kerr of Tonaghmore JSC in *Al Rawi v Security Service*:

> This proposition is deceptively attractive – for what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.[103]

Nevertheless, Steward J in interpreting s 46(2) of the *AAT Act* differently to the minority, stated:

> [T]here will be appeals where, by reason of the nature of the certified material, the Federal Court will not be able to provide an applicant with a fair opportunity to respond to the evidence against them by any of the above means. The certified material may be so sensitive that any form of disclosure would be too dangerous. The possibility of such a case, however, of itself does not make s 46(2) an invalid law. That is because this type of appeal, even with its adoption of an unfair procedure, is not inimical to an exercise of federal judicial power.[104]

On the concept of relying on the gist of the evidence being conveyed to the appellant, Steward J referred to the United Kingdom practice in allowing the gist of the evidence to be disclosed. He indicated a summary of what has been said in a certified document may not constitute disclosure of the contents of a document. It could still be consistent with the public interest.[105] Nevertheless, his Honour also acknowledged there could be times when disclosing even general information could risk public safety.[106]

Steward J determined there were ways and means, of which his Honour did not provide an exhaustive list, but they were sufficient to obviate a procedural unfairness. This, combined with his Honour's view that s 46 of the *AAT Act* did not preclude the Court from adopting any of the suggested mechanisms, meant it was a valid law. Steward J indicated if he had not held this view he would have agreed with the conclusions of Gordon and Edelman JJ.[107]

Conclusion

Keane J has since retired from the court, and Kiefel CJ retired in October, 2023. Obviously, this makes it realistically possible that a case with similar features could be decided differently in the future. Such a

[100] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [199] (Gordon J); [2022] HCA 32.

[101] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [158] (Gageler J); [2022] HCA 32.

[102] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [256]–[265] (Edelman J); [2022] HCA 32. But compare [299] Steward J arguing the courts inherent power to appoint a special counsel.

[103] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [305] (Steward J); [2022] HCA 32, quoting *Al Rawi v Security Service* [2012] 1 AC 531, 592–593 [93]; [2011] UKSC 34.

[104] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [309] (Steward J); [2022] HCA 32.

[105] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [293] (Steward J); [2022] HCA 32.

[106] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [294] (Steward J); [2022] HCA 32.

[107] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [308] (Steward J); [2022] HCA 32.

challenge could relate to the same provision challenged in this case, or other legislation which provides for non-disclosure of material to a party whose interests are implicated or potentially implicated in particular proceedings.[108]

There was no apparent evidence the applicant had been personally involved in terrorist activity. He had not been charged, let alone convicted, of any offence.

These are very difficult matters, involving very substantial principles that potentially lead to different conclusions. We all wish to be kept safe, and demand that government does everything possible in order to achieve this. On the other hand, we have developed over many centuries' fundamental principles of justice. Time has taught us the importance of these. Traditionally, we have determined that, in an adversarial common law system of justice, the best method of determining the truth of the matter is to have a robust exchange of submissions by the parties in conflict. Evidence must be tested through the rubric of cross-examination. History has taught us this is the best (though concededly not failsafe) way in which the court can determine the truth of matters in dispute. Effective cross-examination requires that a party accused of wrongdoing must know enough of the case made against them to properly address it. They must know the identity of accusers, and have them appear in court so that the one accused of wrongdoing can hear what is alleged against them, and have a chance to meaningfully respond.

There was hope that, after the *Kable* decision, the Court might utilise it to defend more robustly, at a constitutional level, fundamental aspects of our justice system from attack. This did not occur. Laws that departed in material ways from these fundamental characteristics were validated. This was a depressing time for those who cherish and fight for such freedoms, including even for those accused of the worst crimes. The decision in *SDCV*, though by a slim majority validating the challenged law, gives some hope that the High Court will, in future, defend these fundamental freedoms. They are too important to be left to the whims of politics. The fight for them has been too long for such principles to be sacrificed for expediency.

[108] See, eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29(3), 31 (*2004 Act*). The anti-terrorism provisions in the *Criminal Code Act 1995* (Cth) specifically encompass the possible use of secret evidence pursuant to the 2004 legislation (eg s 104.5(2A)). Section 104.12A(3) contemplates that material may not be disclosed to a person subject to a control order where (1) it is national security information pursuant to the *2004 Act*; (2) would likely be the subject of a public interest immunity exemption; (3) would likely risk ongoing operations by security agencies; or (4) would likely put at risk the safety of law enforcement or intelligence officers. Thus, a control order can be confirmed by the use of secret evidence to which the affected party is not privy. In *Thomas v Mowbray* (2007) 233 CLR 307, 433–435 (Kirby J (dissenting)) would have invalidated these aspects of the *Criminal Code Act 1995* (Cth).